

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

LAUREN COYLE, on behalf of
herself and all others
similarly situated,

Plaintiff,

v.

HORNELL BREWING CO., et al.,

Defendants.

HON. JEROME B. SIMANDLE

Civil No. 08-2797 (JBS/JS)

OPINION

APPEARANCES:

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-and-

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SIMANDLE, District Judge:

I. INTRODUCTION

This matter is before the Court upon the motion of Plaintiff
Lauren Coyle for reconsideration of the Court's Order denying

Plaintiff's motion for class certification. [Docket Item 144.]

In the Court's May 26, 2011 Opinion and Order [Docket Items 137 & 138], the Court denied class certification on two independent grounds: first, that Plaintiff herself had not demonstrated her adequacy to represent a class of purchasers of Defendants' products within the meaning of Rule 23(a)(4), Fed. R. Civ. P., and second, that Plaintiff had not demonstrated her counsel's adequacy to represent the class also under Rule 23(a)(4).

Plaintiff seeks reconsideration of both determinations, and argues that the Court should therefore certify the proposed class. The Court has reconsidered. While the Court agrees with Plaintiff that its conclusion regarding Plaintiff's counsel was in error, the Court is not persuaded that its determination regarding the adequacy of Plaintiff herself was in error, and the Court will therefore again deny Plaintiff's motion for class certification.

II. BACKGROUND

On August 9, 2007, Plaintiff Lauren Coyle signed an agreement retaining attorney Michael D. Halbfish, Esq. to represent her in a putative class action against Defendants Hornell Brewing Co. and Arizona Beverage Company for "deceptive business practices" related to the use of the word "natural" to

describe products that contain the sweetener high fructose corn syrup ("HFCS"). Donovan Decl. Ex. C, attached to Defs.' Opp. to Mot. to Certify, Docket Item 125.

Approximately eight months later, Plaintiff filed this putative class action in the Atlantic County Superior Court on April 21, 2008; Defendants subsequently removed the action to this Court on June 5, 2008. [Docket Item 1.] In Plaintiff's original Complaint, and in her two subsequent Amended Complaints, she alleges that a mere three weeks prior to filing her Complaint, on March 30, 2008, and on several unspecified dates previously, she was deceived into purchasing an Arizona brand beverage that had been labeled "All Natural" but that contained HFCS, which she believes is not a natural ingredient. Second Am. Compl. ¶¶ 42-46.

On December 15, 2010, Plaintiff sought class certification of her claims for injunctive relief under the New Jersey Consumer Fraud Act ("NJCFA"). The Court denied Plaintiff's motion in an Opinion and Order on May 26, 2011. The Court found that Plaintiff was susceptible to unique defenses regarding her credibility as a result of her repeated allegations in pleadings and in certified discovery materials that she made her qualifying purchase of Defendants' product on March 30, 2008, despite the fact that she had retained an attorney to represent her in this

action under the NJCFA in August of 2007. Consequently, the Court concluded that she was not an adequate class representative under Fed. R. Civ. P. 23(a)(4). Additionally, the Court found that the adequacy of Plaintiff's counsel to represent the proposed class was called into question by the existence of Plaintiff's oft-repeated discrepancies in her pleadings and discovery materials, which alleged she was misled by the Defendants' labeling in the sole documented purchase in 2008, providing an alternative basis to deny class certification for failure to satisfy Rule 23(a)(4).

The Court did not, at the time of its denial of class certification, conduct an evidentiary hearing on the factual question of whether Plaintiff did, in fact, purchase Defendants' product on March 30, 2008 as originally and separately alleged. Thus, the Court did not make any factual finding on whether Plaintiff's Complaint merely contained an erroneous date, or whether, instead, Plaintiff purchased Defendants' product for the sole purpose of bringing this lawsuit, feigning confusion about her only documented purchase of the product in question many months after she retained attorney Michael D. Halbfish to represent her.

Plaintiff seeks reconsideration of the Court's decision to deny class certification on both grounds because, she argues,

contrary controlling decisions of law were overlooked by the Court in reaching its conclusion.

III. DISCUSSION

A. Standard

Local Civil Rule 7.1(i) permits a party to seek reconsideration by the Court of matters "which [it] believes the Court has overlooked" when it ruled on the motion. L. Civ. R. 7.1(i); see NL Industries, Inc. v. Commercial Union Insurance, 935 F. Supp. 513, 515 (D.N.J. 1996). The standard for reconsideration is high and is to be granted only sparingly. See United States v. Jones, 158 F.R.D. 309, 314 (D.N.J. 1994). The movant has the burden of demonstrating either: "(1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court [issued its order]; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." Max's Seafood Cafe v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999) (citing N. River Ins. Co. v. CIGNA Reinsurance Co., 52 F.3d 1194, 1218 (3d Cir. 1995)). The Court will grant a motion for reconsideration on the basis of the need to correct a clear error only where its prior decision has overlooked a factual or legal issue that may alter the disposition of the matter. United States v. Compaction Sys.

Corp., 88 F. Supp.2d 339, 345 (D.N.J. 1999); see also L.Civ.R. 7.1(i).

Plaintiff argues that clear errors of law are present in both the Court's determination that Plaintiff's adequacy was undermined by her credibility concerns as well as the Court's determination that Plaintiff's counsel's adequacy was undermined by the repeated oversights in permitting the inaccurate pleadings and discovery documents to be submitted. Because the Court concluded that each was an independent and alternative reason to deny class certification, in her instant motion for reconsideration, Plaintiff must, at the very least, prevail in demonstrating clear error in both grounds in order to alter the disposition of the matter.

B. Plaintiff's Adequacy

With regard to the Court's conclusion that Plaintiff's adequacy as a class representative was undermined by her credibility concerns, the Court found that Plaintiff was subject to unique defenses that would not be shared by other class members because she pleaded and certified that her qualifying purchase of Defendants' product was made in 2008, after she had concluded that Defendants' product contained HFCS and had retained a lawyer to assist her in bringing suit against Defendants. The Court concluded that

To certify a class with Ms. Coyle as the sole representative, under these highly questionable circumstances, risks the distinct possibility that the class could fail in its claim because its representative will be unable to prove she made a qualifying purchase. This would not be fair to class members who may individually have meritorious claims.

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at *5 (D.N.J. May 26, 2011). Thus, the Court concluded that, even assuming that Plaintiff merely misstated the date of her qualifying purchase in her Complaint (and subsequent amended complaints and discovery materials), the fact of her repeated allegations alone raised a credibility concern sufficient to deny certification on the basis of her adequacy as class representative.

Plaintiff argues first that, to be disqualified as a class representative on adequacy grounds, the Court must find that not only could Plaintiff be subject to unique defenses, but that such unique defenses "could conceivably become the focus of the entire litigation." Zenith Labs, Inc. v. Carter-Wallace, Inc., 530 F.2d 508, 512 (3d Cir. 1976).

Plaintiff then argues that any defenses that she would face as a result of the credibility problems identified by the Court could not become the focus of the entire litigation because, under New Jersey precedent, it would be possible for her to

prevail on her claim for injunctive relief under the NJCFA even if the eventual factfinder concluded that she had not personally suffered an ascertainable loss. For this proposition, Plaintiff cites Weinberg v. Sprint Corp., 173 N.J. 233 (2002).

The Court finds Plaintiff's argument to be unavailing for several reasons. First, the Court notes that the case cited by Plaintiff for the proposition that a plaintiff must face unique defenses that could become the "focus of the entire litigation" (and, indeed, the proposition itself) is raised for the first time in her motion for reconsideration. See Feit v. Great-West Life & Ann. Ins. Co., 460 F. Supp. 2d 632, 643 (D.N.J. 2006) ("matters may not be introduced for the first time on a reconsideration motion").

Second, the Court concludes that, even were it to be considered here, Zenith does not stand for the proposition claimed by Plaintiff. In Zenith, the Third Circuit affirmed the decision of a district court's de-certification order which concluded that the plaintiff was an inadequate class representative because plaintiff was subjected to unique defenses that could become the focus of the entire litigation. 530 F.2d at 512. Zenith did not hold, however, that the only defenses that will disqualify a named plaintiff on adequacy grounds are

those which could become the focus of the entire litigation.¹

Indeed, the Court concluded to the contrary in its May 26 Opinion, citing to Karnuth v. Rodale, Inc., Civ. No. 03-742, 2005 WL 747251 at *3 (E.D. Pa. Mar. 30, 2005) for the proposition that “[t]o deny certification, a court need not conclude that credibility problems would ultimately defeat the class representative’s claim; rather, the court may deny class treatment if that unique defense is even arguably present.”

Additionally, the Court disagrees with Plaintiff’s contention that the unique credibility defenses could not become the focus of the litigation in this matter. Plaintiff cites to Weinberg, quoting dicta in the opinion that states that “even if the plaintiff ultimately loses on his damage claim but does prove an unlawful practice under the [New Jersey Consumer Fraud] Act” the plaintiff might still recover on an injunctive relief claim. Weinberg, 173 N.J. at 253. However, the Court notes that this language in the Weinberg opinion was merely distinguishing the issue then facing the court from the earlier case of Cox v. Sears Roebuck & Co., 138 N.J. 2 (1994). The proposition cited by Plaintiff is merely recited by the Weinberg court, but is not the holding.

¹ The Court can find no controlling authority for such a proposition.

[I]n Cox we suggested that a plaintiff who reaches the factfinder on a claim of ascertainable loss and succeeds in proving an unlawful practice but does not succeed in proving damages, should be eligible nonetheless to recover attorneys' fees for bringing the action [and, by implication, injunctive relief].

Weinberg at 253.

The court went on to distinguish the case it was presently facing, however, stating that

[t]he question now squarely before us is whether a plaintiff, who pleads but cannot survive a motion for summary judgment in respect of the issue of ascertainable loss, may proceed with remaining claims for injunctive relief and attorney's fees under the Act. We hold that that plaintiff cannot go forward.

Id. The Court finds that this holding squarely supports its conclusion that the unique credibility defenses facing Plaintiff Coyle in the instant matter could become the focus of the entire litigation.

The Court notes that Plaintiff has not survived summary judgment on the issue of ascertainable loss, and, were the case to go forward with only the evidence currently in the record, Plaintiff would have great difficulty surviving such a motion. The only evidence in the record currently raising a dispute of fact over whether Plaintiff made her sole qualifying purchase of Defendants' product prior to hiring an attorney to file suit in

this matter is contained in a Declaration submitted in April of 2010 after Defendants argued that Plaintiff had, on five prior occasions, alleged that she made the qualifying purchase on March 30, 2008, which happens to be more than seven months after she retained Mr. Halbfish. Defendants have persuasively argued that this declaration could be disregarded on a summary judgment motion as a "sham affidavit." See Jiminez v. All Am. Rathskeller, Inc., 503 F.3d 247, 254 (3d Cir. 2007). With a record showing no dispute of fact that Plaintiff's only qualifying purchase of Defendants' product took place after Plaintiff herself knew and had concluded that the product was not "all natural," Plaintiff's entire action would be vulnerable to a motion for summary judgment on the issue of ascertainable loss, which would prevent Plaintiff (and the class she would seek to represent) from pursuing even injunctive relief according to Weinberg.

At this juncture, the Court is not called upon to decide a future summary judgment motion but rather to predict whether it is likely that the predicament this proposed class representative has created for herself could become a major focus of this case in a manner distinguishing her from the class she would represent and imperiling the rights of putative class members. Without doubt, determining whether this Plaintiff made her purchase of

Defendants' product on the date she repeatedly claimed, after she had retained a lawyer to file suit, would become a major focus and quite probably a show-stopper for this class. Thus, the Court concludes that Plaintiff is incorrect that the unique defenses identified by the Court are not likely to become the focus of the entire litigation.

Additionally, Plaintiff argues that the Court wrongly denied class certification on the basis of adequacy because the Court had discretion to instead certify the class and permit Plaintiff's counsel to substitute a different named plaintiff who would not face such adequacy problems. Again, the Court notes that this proposition was not presented to the Court prior to its May 26 Opinion, and is not supported by any controlling law in Plaintiff's brief. The argument therefore fails to meet the burden of demonstrating that the Court's decision overlooked a legal issue of controlling law that may alter the disposition of the matter. Compaction Sys. Corp., 88 F. Supp.2d at 345. The Court therefore concludes that it will not grant reconsideration to Plaintiff on the issue of Plaintiff's adequacy to serve as class representative.

C. Plaintiff's Counsel's Adequacy

In addition to finding that Plaintiff had not satisfied the requirements of Rule 23(a)(4) herself, the Court also concluded,

as an independent basis for denying Plaintiff's motion to certify, that under Rule 23(a)(4), the adequacy of Plaintiff's counsel was undermined as a result of Plaintiff's repeated pleadings and certified discovery responses including the March 30, 2008 allegation. In the instant motion, Plaintiff seeks reconsideration of this finding, arguing that the Court overlooked contrary, controlling law in its conclusion.

Plaintiff first argues that the Court erred by not evaluating the adequacy of Plaintiff's counsel under the standards of Rule 23(g), Fed. R. Civ. P., citing Sheinberg v. Sorensen, 606 F.3d 130, 132 (3d Cir. 2010). In Sheinberg, the district court denied class re-certification because it found that the plaintiff had not demonstrated that its newly appointed class counsel was adequate under Rule 23(a)(4). Id.

The Third Circuit vacated the order, finding that the district court erred by not considering the adequacy of the plaintiff's proposed class counsel under the factors of Rule 23(g), which govern the appointment of proposed class counsel after a class has been certified. Id. at 133. Thus, while Sheinberg does not directly address whether the Rule 23(g) factors are to be considered when evaluating the adequacy of class counsel prior to the certification of a class, the language of the opinion can be read to apply in such a circumstance. See

id. at 132-33 ("Although questions concerning the adequacy of class counsel were traditionally analyzed under the aegis of the adequate representation requirement of Rule 23(a)(4) of the Federal Rules of Civil Procedure, those questions have, since 2003, been governed by Rule 23(g). . . . We have accordingly reviewed the provisions of Rule 23(g) at length in order to remind those handling class actions that its standards now govern the appointment of, and questions concerning the adequacy of, class counsel.") Consequently, the Court will reevaluate the adequacy of Plaintiff's counsel under the Rule 23(g) factors.²

Under Fed. R. Civ. P. 23(g)(1)(A), the Court is directed to consider

- (i) the work counsel has done in identifying or investigating potential claims in the action;
- (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
- (iii) counsel's knowledge of the applicable law; and
- (iv) the resources that counsel will commit to representing the class.

Fed. R. Civ. P. 23(g)(1)(A).

² While Plaintiff did not raise the issue of assessing Plaintiff's counsel's adequacy under Rule 23(g) or the Sheinberg case in the briefing on the motion to certify, the Court will consider the issue on this motion for reconsideration because the adequacy of Plaintiff's counsel was not contested by Defendants and Plaintiff's counsel was not given a full opportunity to brief the issue.

Plaintiff presents a history of the vigorousness and competence with which Plaintiff's counsel has prosecuted this case and similar cases that testify to the adequacy of Plaintiff's counsel to act as class counsel and litigate class actions. Plaintiff additionally argues that, in the context of this overwhelming evidence of competence, the inadvertent inclusion of an incorrect date in the original Complaint, which was replicated though discovery and subsequent Amended Complaints, does not outbalance the lengthy list of accomplishments demonstrating adequacy of Plaintiff's counsel in this case under the Rule 23(g) factors. See Sheinberg, 606 F.3d at 134 (noting that, under Rule 23(g) factors, "[n]ot every mistake by counsel, however, inexorably prejudices class interests.").

The Court finds this argument persuasive. It is clear that Plaintiff's counsel made a serious error by either (a) prosecuting this NJCFA case based upon a purchase that did not occur until after this consumer had already retained counsel, or (b) continually misstating the date of purchase, in pleadings, amended pleadings and discovery responses, as March 30, 2008, when that date was erroneous. Counsel's error, if of the second type, while serious and material, is outweighed by Plaintiff's counsel's otherwise positive record under the Rule 23(g) factors.

The "error" does not overbalance the efforts taken by Plaintiff's counsel to investigate claims in this action, counsel's experience in litigating class actions, counsel's knowledge of the applicable law, and the resources Plaintiff's counsel has demonstrated they are willing to commit to representing the putative class.

By contrast, had the Court actually made the factual finding that the purchase date originally alleged was, in fact, accurate, and the purchase was made at the direction of Plaintiff's counsel for the sole purpose of bringing this lawsuit, the Court's conclusion that such actions by counsel undermined adequacy would be the same regardless of whether Rule 23(a)(4) or Rule 23(g) governed the decision, because such collusion by counsel to manufacture a case or controversy would have required a sham pleading. In the absence of this factual finding, however, the Court will assume the allegation was merely an error, albeit a serious one, that does not independently render Plaintiff's counsel inadequate to represent a class, given the relevant factors under Rule 23(g).

The Court, therefore, concludes that its denial of class certification on the independent basis of Plaintiff's counsel's adequacy was incorrect on the record before it and under the factors of Rule 23(g). The Court will therefore strike the

discussion of adequacy of class counsel in its Opinion of May 26, 2011 at pages 15-16, and find instead that upon the present record, there is an insufficient basis to find that Plaintiff's counsel would be inadequate under Rules 23(a)(4) and 23(g). However, as the Court has concluded that reconsideration of its determination to deny class certification on the basis of Plaintiff's adequacy under Rule 23(a)(4) is not warranted, the Court must deny Plaintiff's motion for reconsideration and again denies class certification.

IV. CONCLUSION

While the Court has reconsidered its conclusion that Plaintiff's counsel was inadequate, the Court finds that Plaintiff has not presented any valid reason to warrant reconsideration of the determination that she has failed to prove that she will adequately represent the proposed class. Consequently, the Court must deny Plaintiff's motion for class certification in this case because Plaintiff Lauren Coyle fails to meet the requirements of Rule 23(a). The accompanying Order will be entered.

August 30, 2011
Date

s/ Jerome B. Simandle
JEROME B. SIMANDLE
United States District Judge